

**Editor's note: 98 I.D. 185; Appealed -- sub nom. Livingston Silver, Inc. v. Lujan, Civ.No. 92-0048-E-EJL (D. Idaho Jan. 31, 1992), remanded to join Livingston Silver in contest action (Dec. 10, 1993), administratively terminated without prejudice (March 2, 1994)**

UNITED STATES

v.

ELMER H. SWANSON

IBLA 89-54

Decided March 29, 1991

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., declaring the Livingston tunnel site, IMC 27881, invalid. ID-23098.

Affirmed as modified.

1. Mining Claims: Tunnel Sites

Pursuant to 30 U.S.C. § 27 (1988) failure to prosecute work on a tunnel for 6 months shall be considered an abandonment of the right to all undiscovered veins on the line of such tunnel.

2. Mining Claims: Tunnel Sites

The language of 30 U.S.C. § 27 (1988) clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute the tunnel for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes.

3. Mining Claims: Tunnel Sites

The right to utilize a tunnel site for development of a mine is essentially a right-of-way and can be abandoned. Abandonment of a right-of-way can be predicated upon a showing that the means of enjoyment of it have long been in a state of disrepair.

APPEARANCES: Erol R. Benson, Esq., Office of the General Counsel, United States Department of Agriculture, Ogden, Utah, for the Forest Service; Royce B. Lee, Esq., Idaho Falls, Idaho, for contestee/appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On June 25, 1986, the U.S. Forest Service (FS), United States Department of Agriculture, filed a document requesting that the Bureau of Land Management (BLM) contest the Livingston tunnel site, ID-23098. The Livingston tunnel site is held by Livingston Silver, Inc. (LSI), Elmer H. Swanson, president. On July 2, 1986, BLM filed a contest complaint that charged: "The claimant has not met the requirements of the law as to monument, notice, starting a tunnel, and diligently pursuing work on the tunnel from the date of withdrawal, August 22, 1972, to March 28, 1986." 1/

On August 15, 1986, Swanson filed a response to the contest complaint and the matter was assigned to Administrative Law Judge John R. Rampton, Jr.

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1/ The tunnel site, described in the complaint as secs. 3, 4, 9, and 10, T. 9 N., R. 16 E., Boise Meridian, Custer County, Idaho, was located Mar. 1, 1926, by Arthur V. Corry, resident manager, Livingston Mines Corp. After mesne conveyances, it was transferred first to Elmer Swanson then, in 1975, to LSI. The lands covered by the tunnel site were withdrawn from location under the mining laws effective Aug. 22, 1972, by the Sawtooth National Recreation Area Act, 16 U.S.C. §§ 460aa through 460aa-9 (1988).

A hearing was held on August 25, 1987, in Challis, Idaho. A portion of Judge Rampton's summary of the hearing is set forth below:

James J. Jones, a qualified mineral examiner employed by the U.S. Forest Service (see Exh. 3), testified that he visited the subject tunnel site seven times (Tr. 25). His first visit occurred September 11, 1973, in the company of contestee Elmer Swanson (Tr. 25-26). He observed a trench, but no tunnel, no monument, no notice and no evidence of tunneling activity (Tr. 26-28; Exh. 8). Nor did he observe any evidence or remnants of any tunnel that might have existed there previously (Tr. 28).

Mr. Jones visited the site a second time, also in the company of contestee, on July 10, 1975 (Tr. 29). He observed no change from what he found during his first visit. Mr. Jones' third visit, made on July 24, 1978, yielded the same observations (Tr. 30; Exh. 9; cf. Exh. 8).

Mr. Jones' fourth visit occurred on October 2, 1984, again in the company of contestee (Tr. 31). On this visit Mr. Jones observed that the old trench had been supplanted by a newer and longer trench (approximately 500-600 feet in length). He still observed no tunnel, no monument, and no notice (Tr. 31).

Mr. Jones' fifth visit occurred on August 26, 1986, in the company of Mr. Alfred Swanson, contestee's son (Tr. 32). Mr. Jones observed nothing different from his visit in 1984 except that there was then a post (monument) at the trench.

On his next visit, June 4, 1987, Mr. Jones observed that some sixteen timbers had been set. Still no tunnel had been commenced (Tr. 32-34; Exhs. 10-15).

On his last visit, August 12, 1987, Mr. Jones noted several more timbers had been set, and he discovered a notice in a can attached to a post. Still no tunnel had been commenced (Tr. 34-39; Exhs. 16-25).

(Decision at 4).

Mr. Jones also testified that he had viewed aerial photographs of the area taken in 1959, 1969, 1972, and 1977. His opinion was the photographs show that within a 25-percent margin of error, the trench was the same size

throughout the period from 1959 to 1977, and that there were no surface disturbances during the 1-year periods prior to the photographs (Tr. 40-49).

Randall Karstaedt, a forester employed by FS, also testified, essentially substantiating Mr. Jones' testimony for the period from 1984 through 1987. Karstaedt visited the site five times from December 2, 1984, through August 12, 1987, and never saw a tunnel (Tr. 14-18).

Elmer Swanson, president of LSI, was unable to attend the hearing due to illness. His son, Alfred Swanson, testified for appellant. Alfred Swanson stated that he worked on the tunnel site prior to 1977; however, he only has a record of the dates and type of work done from 1977 until the time of the hearing. Appellant's Exhibit A is six pages upon which are recorded the dates, number of hours, and other information concerning work performed on the tunnel site by Alfred Swanson from December 26, 1977, through August 23, 1987. Alfred Swanson testified that when he worked on the tunnel site from 1977 until 1984, he removed dirt and rock from the bottom of the trench with a pick and shovel, and put the dirt and rock outside the trench (Tr. 70-71, 87-88). He also testified that there were old dump piles visible on the site prior to the time he began work on the tunnel site (Tr. 71-72). Swanson testified that he performed at least \$100 worth of work at the tunnel site each year from 1977 through 1987, and that to the best of his knowledge, proper assessment work had been performed each year (Tr. 73). He stated that in the course of digging on the tunnel site with a bulldozer, he dug up old timbers which he photographed at a later

date (Tr. 74-76, 84-85; Exhs. B and C). Swanson stated that LSI intends to use the tunnel for draining water and removing ore from the Livingston mine, as well as exploring for new veins or lodes.

Alfred Swanson further testified that on August 21, 22, and 23, 1987, he dug a tunnel underground for about 25 feet on the Livingston tunnel site. He presented testimony concerning Exhibit I, which consists of copies of proofs of labor and notices of intent to hold filed with the county for many mining claims and related mill and tunnel sites for each year from 1972 until 1986. These annual filings apply to the Livingston tunnel site during the years 1972, 1973, 1975, and from 1978 through 1986.

At the hearing, counsel agreed to a stipulation that engineer Frank Taft was present in the courtroom and would testify, if asked, that the presence of timbers such as those described by Alfred Swanson would indicate a tunnel once existed (Tr. 95-96).

Answers to interrogatories were submitted by Elmer Swanson on September 21, 1987. His statement reads in part:

In 1946 I was at the tunnel site. The Livingston tunnel was run for 250 feet at the Livingston tunnel site. The tunnel site notice was posted on a four foot stake. The tunnel site notice had aged but could still be read. In 1960 the tunnel site notice was moved to allow workmen to remove the slough in the tunnel. I have personally observed the monument and notice posted every year from 1972 to 1985. The stake upon which the tunnel site notice was posted was replaced in June 1978. The tunnel site notice was still readable but no forest service official has ever asked for the location. \* \* \*

\* \* \* \* \*

Although partly obliterated by recent work, evidence of past work at the portal site is easily recognized. Most notable are old cat-spoils with sage, lupine, and various grass species growing on them, and old rotted and broken mine timbers; obviously the work was done several years ago. \* \* \*

\* \* \* \* \*

\* \* \* From August 22, 1972 to August 25, 1987 Livingston [S]ilver, Inc. and Elmer H Swanson spent \$19,164.00 on the Livingston tunnel.

The tunnel is timbered for 71 feet. The tunnel is driven for 223 feet as a trench because the ground caved onto the floor of the tunnel. The total distance the tunnel has been driven equals 294 feet. Since it collapsed in 1975 after being driven seventy, eighty, a hundred feet.

Other costs on the Livingston tunnel site: In 1978 Ed Obenchain was paid one hundred dollars to reset the stakes. The road to the tunnel site cost \$1,100.00.

Howard Cameroun had a lease on the Livingston mine and mill, paid Alfred Swanson \$735.00 for working on the tunnel on the tunnel site claim.

Total Amount Spent On The Livingston Tunnel and Tunnel Site: \$21,099.00.

(Answers to Interrogatories at 1-3).

Based on the evidentiary record, Judge Rampton found the tunnel site was not in compliance with the law and was therefore invalid:

Assuming that there was a tunnel at the site in question at one time, the tunnel had ceased to exist before September 1973 (see Exhs. 8 and 9) and has not since been restored (see Exhs. G, H, 11 through 16, and 18 through 24). If, as appears likely, the tunnel ceased to exist prior to August 22, 1972, contestee would be precluded from re-entry thereafter to establish a tunnel site because of the Sawtooth Recreation Area withdrawal.

Even assuming that a tunnel existed past the date of withdrawal, I must conclude that its restoration has not been prosecuted diligently as required by the Tunnel Site Act. There has been no tunnel for at least 14 years.

(Decision at 6).

In its statement of reasons (SOR), appellant argues the right to undiscovered veins or lodes found in the prosecution of the tunnel is not an issue herein; the Government failed to present a prima facie case of abandonment or any conclusive proof of abandonment; the contestee showed by a preponderance of the evidence that it had no intention of abandoning the tunnel site; the contestee established that a tunnel had actually been commenced at the Livingston tunnel site and that it was properly located in 1926; contestee complied with monument requirements; contestee prosecuted the tunnel site with reasonable diligence so as to prevent a finding of abandonment; and after a tunnel caves in, the owner of the tunnel site should be allowed to redevelop it. Counsel for FS characterizes the major issue of the case as whether the tunnel site was a valid claim pursuant to 30 U.S.C. § 27 (1988) on August 22, 1972, the date of establishment of the Sawtooth National Recreation Area, or at the time of the hearing (August 25, 1987). In its Answer, FS argues a tunnel did not exist in 1972 or at the time of the hearing, and the lack of a tunnel precludes a finding that a valid tunnel site exists, despite LSI's expenditures.

The statutory provision popularly known as the Tunnel Site Act reads:

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall

have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. [Emphasis supplied.]

30 U.S.C. § 27 (1988).

The validity of the Livingston tunnel site has previously been the subject of a Board opinion. In United States v. Livingston Silver, Inc., 43 IBLA 84 (1979), overruled to the extent inconsistent, United States v. Albert F. Parker, 82 IBLA 344, 91 I.D. 271 (1984), we adopted an Administrative Law Judge opinion which dismissed a 1977 FS contest complaint relating to the tunnel site but which expressly found LSI's right to use the tunnel for development purposes continued. 43 IBLA at 86. In United States v. Albert F. Parker, we overruled a portion of the United States v. Livingston Silver, Inc. decision, but we did not overrule any portion of the decision relating to LSI's right to utilize the tunnel for purposes of developing mines on other sites.

The effect of our decision in Albert F. Parker was to reopen the issue of appellant's right to undiscovered veins or lodes in the line of the tunnel. This is the change of law which prompted the filing of the current FS contest complaint (Contestant's Brief of Aug. 1, 1988, at 2). Thus, despite the statement by counsel for appellant that this appeal does not



involve the right to possess any blind vein or lode (SOR at 5), it is necessary to specify our conclusions with respect to both development rights and rights to any blind veins or lodes. This is important given the fact that appellant's witness at the hearing stated one purpose of the tunnel is to explore for new minerals (Tr. 82-83).

[1] We find appellant failed to diligently prosecute the work on its tunnel site for 6 months, thereby conclusively abandoning its right to any blind veins or lodes which might be discovered on the line of the tunnel claimed by appellant. The testimony and photographs presented by FS establish that from at least 1973 until 1978 the tunnel site remained virtually untouched. Although appellant presents evidence that Elmer Swanson visited the site each year from 1972 through 1985, diligent prosecution of a tunnel is not established by visitation. Furthermore, we agree with Judge Rampton that Alfred Swanson's testimony concerning the labor he performed at the tunnel site from 1977 through 1984 does not establish prosecution of a tunnel for those years.

[2] However, the Tunnel Site Act clearly distinguishes between the right to undiscovered veins on the line of a tunnel and the right to use the tunnel for development of a mine. Failure to diligently prosecute the tunnel for 6 months does not constitute a statutory abandonment of the right to use the tunnel site for development purposes. Fissure Mining Co. v. Old Susan Mining Co., 63 P. 587 (Utah 1900); 1 American Law of Mining § 32.07[5] (2d ed. 1984); 2 C. Lindley, Lindley on Mines § 631 (3rd ed.

1914). To the extent this distinction is not recognized in the decision appealed from, it is modified accordingly.

[3] Although the right to use a tunnel for development purposes is not abandoned by failure to prosecute tunnel work pursuant to 30 U.S.C. § 27 (1988), such development rights can be abandoned. 1 American Law of Mining § 32.07[5] (2d ed. 1984). Tunnel sites are not mining claims but rights-of-way. Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel Mining & Transportation Co., 196 U.S. 337, 357 (1905); David Doremus, 115 IBLA 336, 341 (1990); Elsworth & Dolores Loveland, 89 IBLA 205, 207 (1985). Abandonment of a right-of-way may be predicated upon a showing that the means of enjoyment of the right-of-way have long been in a state of disrepair. City of Stockton v. Miles & Sons, Inc., 165 F. Supp. 554, 559 (N.D. Cal. 1958); Flanagan v. San Marcos Silk Co., 106 Cal. App. 2d 458, 235 P.2d 107 (Cal. Dist. Ct. App. 1951); Raedell v. Anderson, 98 Kan. 216, 158 P. 45 (Kan. 1916). Abandonment occurs immediately when an intent to abandon exists along with an act of abandonment. 25 Am. Jur. 2d Easements & Licenses § 103 (1966); 2 American Law of Mining § 46.01[6] (2d ed. 1984).

There have been no allegations or evidence whatsoever that a tunnel to be utilized in development of the Livingston mine ever existed. It is clear that use of the subject land for the purpose of developing the nearby Livingston mine was impossible for many years. The fact that the means of enjoyment of the right-of-way had long been in a state of disrepair is persuasive evidence of abandonment of the right-of-way.

We have carefully weighed the evidence submitted and find none of it establishes the validity of the tunnel site for use as a right-of-way. Filing of annual proofs of labor or notices of intent to hold can be evidence of a lack of intent to abandon, 2 American Law of Mining § 46.01[8][a] (2d ed. 1984), and failure to file documents on an annual basis has evidentiary value in proving a charge of abandonment, United States v. Catlin Bohme, 48 IBLA 267, 302, 87 I.D. 248, 265 (1980). Appellant establishes that proofs of annual assessment work or notices of intent to hold for the tunnel site were filed with the county in 1972, 1973, 1975, and from 1978 through 1986. However, the documents filed with the county in 1974, 1976, and 1977 do not pertain to the Livingston tunnel site. Thus, the filings with the county are insufficient to overcome the evidence of abandonment.

Work on the tunnel site could also serve to negate any evidence of abandonment. The only evidence of activity on the site from 1973 until December 1977 is Alfred Swanson's testimony that he worked on the Livingston tunnel site prior to 1977, but no longer has records which would allow him to specify when this work occurred. Moreover, when asked to describe the tunnel site in 1972, Alfred Swanson testified, "My memory doesn't go that far. I remember very little at that time" (Tr. 68). The aerial photographs, coupled with the testimony of contestant's witnesses at the hearing, constitute strong evidence that no labor was performed on the tunnel site from 1973 until sometime after Mr. Jones' third visit to the site on July 24, 1978. Consequently, we find that appellant has failed to establish by a preponderance of the evidence that its tunnel site is valid.

We find appellant abandoned the Livingston tunnel site. Appellant's renewed interest in the tunnel site, which appears to have commenced in defending the claim against the initial contest complaint in 1977, is not sufficient to create a new tunnel site right-of-way because the land had been withdrawn from entry in 1972. See Maley, Mining Law from Location to Patent (1985) at 103.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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Wm. Philip Horton  
Chief Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge